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No. 82-1168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANK ANGELO MONACO, an infant under the age of 14 years, by his parent and natural guardian, FRANK ANTHONY MONACO, DIANA LYNN MONACO and FRANK ANTHONY MONACO,

Petitioners,

against

FREDERICK S. FEINER, ALAN L. RUBENSTEIN, IRA RUBENSTEIN, FRED S. LEVINSON, E. RICHARD KINNE, individually and as co-partners in the firm of "JOHN DOE", a partnership, said name "JOHN DOE" being fictitious, true name unknown to Plaintiffs, and SATISH K. ROHATGI, ELIZABETH A. HORTON MEMORIAL HOSPITAL and MIDDLETOWN OBS-GYN ASSOCIATES, P.C.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

BRIEF OF DEFENDANT-RESPONDENT, SATISH K. ROHATGI, IN OPPOSITION TO PLAINTIFFS' PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Does legitimate investigation conducted by the co-defendant obstetricians and their attorney to verify factual testimony of the opposing party's expert witness and to verify the expert's credentials constitute tampering with petitioners' principal witness?

2. Did the conduct of the Trial Court in denying the plaintiffs' motion for a mistrial after conducting a full and competent hearing and investigating plaintiffs' allegations of "tampering" of this witness, constitute any violation of due process of law?

3. Given the chronology of events concerning the tampering issue, namely the realistic investigation by the Trial Court, the affirming of the defense verdict by the Appellate Division of the Supreme Court, Second Judicial Department, New York, with further leave to appeal denied by the New York State Court of Appeals, is there a substantial federal question, such that review by the Supreme Court is warranted?

Statement of the Case

Aside from the jury passing on the propriety of obstetrical and pediatric case* (which they resolved in favor of the defendants), the cause(s) of the blindness, seizures and other ophthalmological and neurological damages was either due to:

(a) As the plaintiff contended, periods of hypoxia, due to obstetrical mismanagement, resulting in a "predisposition" of the infant to increased sensitivity to the DPT vaccine, and DPT-induced encephalopathy OR,

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* Claims against the obstetrician:
1. Cesarean section delay.
2. Fetal Heart rate not timely monitored.
3. Fetal monitor was not used.
4. Presence of fetal distress.
5. Passage of meconium.
6. Drop in fetal heart rate.

Claims against the pediatrician:
Contraindicated DPT injections in light of reactions from prior DPT injections.

(b) As the defense contended, that the diagnosis of congenital bilateral hypoplasia (lack of tissue) of the optic nerves, together with septo-optic dysplasia (absent brain tissue about the area of the optic nerves) allowed for the blindness, and related symptom complex. Such congenital conditions occurred in the first three months of fetal life when there were no criticisms of any of the defendants' conduct. All of the treating physicians, including Dr. Gold, a pediatric neurologist who treated the infant at Columbia Presbyterian Hospital, Dr. Behrens, a neuro-ophthalmologist, who treated the infant at Columbia Presbyterian Hospital and testified at the trial and Dr. Mermell, an ophthalmologist, who treated the child at Middletown, New York and testified during the trial, were of the opinion that the aforementioned deficits were congenital.

The jury adopted the reasoning of the defense.

The basis of such reasoning was well-grounded in the Columbia Presbyterian Hospital record and in the records of treating physicians, in the sophisticated aforementioned specialities. In addition, pediatric expert, Dr. Larkin, neuro-radiology expert, Dr. Schnur and pediatric neurologist, Dr. Chutorian, all postulated that the infant's deficits were of congenital origin, and unrelated to departures on the part of the treating defendants. In addition, these opinions were supported by demonstrative proof in the form of CAT scans.

The jury's verdict was appealed to the Appellate Division of the Supreme Court, Second Judicial Department. That Court affirmed the judgment of the Court below without opinion; thereafter plaintiffs' motion to the Appellate Division for renewal and for leave to appeal to the New York State Court of Appeals was denied. Plaintiffs' motion to the Court of Appeals for leave to appeal to that Court was also denied.

Summary of Argument

1. The investigation conducted by the obstetricians and their counsel Mr. Ryan does not constitute "tampering" with a witness; neither the Trial Court nor the Appellate courts of New York could unmask any evidence of improper conduct on the part of these litigants. Dr. Rohatgi and his counsel Mr. Habian, were not involved at all in this proper investigation. No proof in any degree was adduced from plaintiffs' obstetrician expert Dr. Sherman as against Dr. Rohatgi, the pediatrician.

2. There was absolutely no violation of any due process of law considering the chronology of events below as the Trial Court denied plaintiffs' motion for a mistrial in conducting a hearing to evaluate the claims made by the plaintiffs concerning the investigation conducted by the respondent obstetricians and their counsel Mr. Ryan. The issue here is not one of constitutional import, but purely an evidentiary question correctly decided by the Trial Court. Since there is no federal question involved a grant of certiorari is not warranted.

3. Notwithstanding the petitioner's comments contained in the Supplement to the Petition for the Writ of Certiorari concerning the fact that "expert testimony" is not available in medical malpractice actions and that the medical profession has considered itself beyond the reach of the normal principles of law, such arguments are spurious. There exists no reason for certiorari concerning the facts in this case. There exists no conspiracy of silence, and the discovery avenues available to all litigants allow adequate criticisms to be made of defendant-physicians, even by the parties themselves through depositions. There is not an issue here of national scope and no federal question is presented. As in every case where expert witnesses appear to discuss areas outside the general expertise of

the jury, investigation is conducted into the quantity of times that experts have testified, and prior inconsistent statements made under oath are investigated so as to have as truthful a picture as possible of what the expert is offering to the jury.

POINT I

There was no tampering with a witness in the trial proceeding below.

As indicated before, the pediatrician Dr. Rohatgi and his counsel Mr. Habian were not involved in any aspects of this proper investigation into the background of the obstertical expert Dr. Sherman. In addition, none of the testimony offered by Dr. Sherman established any areas of liability as against the pediatrician Dr. Rohatgi.

The Court properly held a hearing to establish the nature of certain telephone calls made to check into the background of Dr. Sherman. The hearing conducted by the Court analyzed the following topics:

a. Dr. Sherman's contact with his superior, Dr. Morris regarding his appearance at trial.

b. The fact that Dr. Sherman did not think that he did anything improper in testifying.

c. That there existed no rules at his affiliated hospital, University Hospital that required permission of the staff before testifying.

d. That Dr. Sherman's superior was not critical of his offered opinion.

e. That Dr. Sherman still was willing to continue this testimony (and indeed did continue his testimony).

f. That Dr. Sherman had reviewed other hospital charts for attorneys involving issues of medical malpractice.

g. That Dr. Sherman was aware that his testimony was to become part of a public record.

h. That the investigation involved research into the credibility of Dr. Sherman's claims regarding teaching responsibility and the number of deliveries he had, in fact, performed.

It became clear to the Court that these calls amounted to nothing more than an entirely proper effort by Mr. Ryan to obtain information from University Hospital pertaining to Dr. Sherman's background and experience with a view toward the cross-examination. It was also established that many of the opinions and general statements voiced by Dr. Sherman were opinions which he alone harbored. Those opinions were not, in fact, shared by Dr. Sherman's contemporaries in the Department of Obstetrics at the University Hospital.

Upon concluding the hearing, the Court was satisfied that the above-mentioned contact was innocuous and could, in no way, affect the impact of the testimony which Dr. Sherman had given. In fact, Dr. Sherman assured the Court that he was fully prepared to continue his testimony.

It is respectfully submitted that the Court below was in the best position to evaluate the totality of the circumstances; upon careful consideration of the content of the testimony elicited at the hearing, and the demeanor and the credibility of the respective participants, the Court denied the motion for a mistrial concluding: "that nothing has developed in the hearing this morning either from Dr. Sherman or Dr. Feiner . . . which indicated that anyone had interceded with Dr. Morris in order to bring about *any change* in the witness' testimony . . . there was no prima facie showing that there was an interference with the witness . . ."

POINT II

Certiorari should be denied because the issue in this case involves essentially an evidentiary ruling by the Trial Court.

The Trial Court made an evidentiary ruling, totally within its judicial discretion; such ruling was affirmed by the Appellate Division of the Supreme Court of the State of New York without opinion. It is a well-settled principle of law that a petition for a writ of certiorari will not be granted to review purely evidentiary questions (*General Talking Pictures Corp.* v. *Western Electric Co., et al.*, 304 U.S. 175, 58 S.Ct. 849 82 L Ed. 1273, [1973].

POINT III

There is no substantial federal question so as to allow this court to exercise its discretion in granting certiorari.

Throughout the appeal proceedings below after the verdict in favor of defendants, the plaintiff-appellants concentrated their arguments on the tampering issue, on a criticism of the charge given by the Trial Judge, and on the form of particular questions asked by counsel for the defendants of witnesses in the case. *Never* has a claim of constitutional violation of a due process right been brought before the Appellate courts below. There has never been a federal question involved in the proceedings in the Trial Court and there does not exist a federal question now, merely by reason of the fact that the petitioners have exhausted all of their remedies below. The lower courts, including the Appellate Division and the Court of Appeals, have agreed with the Trial Court's rulings.

Essentially, there is overwhelming evidence to support the verdict for the defendants by reason of general medical

principles, concessions made by the plaintiffs' expert witnesses on cross-examinations, medical records maintained by the treating physicians previously mentioned, and the medical records of the major treating institution, Columbia Presbyterian Hospital, which listed the infant's deficits in this case as purely congenital, namely the sophisticated diseases of congenital bilateral hypoplasia of the optic nerves and septo-optic dysplasia.

Given the substance of the trial record, the basis for the defense, the lack of improper conduct on the part of the obstetricians or their counsel, the lack of involvement of Dr. Rohatgi and his counsel in the issue before this Court, namely the so-called tampering issue, the lack of federal question or any special or important reason for granting certiorari considering that the issue is purely an evidentiary one, the petition for certiorari should be denied.

CONCLUSION

There exists no proper basis for a grant of certiorari in this case.

Respectfully submitted,

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